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In the

# Supreme Court of the United States

ENTERGY CORPORATION, et al.,

*Petitioners,*

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Whether Section 316(b) of the Clean Water Act, 33 U.S.C. § 1326(b), authorizes the Environmental Protection Agency (EPA) to compare costs with benefits in determining the "best technology available for minimizing adverse environmental impact" at cooling water intake structures.

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## IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioners Entergy Corporation, et al.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF attorneys represented the petitioner in this Court in *Rapanos v. United States*, 547 U.S. 715 (2006), a case addressing the scope of the Clean Water Act (CWA). PLF has participated as amicus curiae in this Court on matters concerning the various federal environmental statutes, including the CWA, in cases such as *Borden Ranch P'ship v. United States Army Corps of Engineers*, 537 U.S. 99 (2002), *Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), and *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981).

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[1]Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Amicus considers this case to be of special significance in that agency use of cost-benefit analysis within the environmental regulatory framework is crucial to maximizing regulatory efficiency and maintaining a legitimate balance between economic realities and the protection of our natural resources.

## SUMMARY OF ARGUMENT

Legal writers have conducted a long and vigorous debate on the merits of cost-benefit analysis within the environmental regulatory system. "That debate appears to be terminating with a general victory for the proponents of cost-benefit analysis." Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 Mich. L. Rev. 1651, 1655 (2001). This comparison of regulatory costs and benefits, long advocated by "many prominent legal academics–including Cass Sunstein, Richard Posner, and Justice Stephen Breyer," Stephen Clowney, Note, *Environmental Ethics and Cost-Benefit Analysis*, 18 Fordham Envtl. L. Rev. 105, 107 (2006), is and has been a common feature in regulatory regimes spanning several decades and the expanse of the partisan divide. Sunstein, 99 Mich. L. Rev. at 1655-56 (noting executive orders requiring cost-benefit analysis signed by Presidents Reagan, George H.W. Bush, and Clinton). Indeed, the relevant regulatory question currently is how to implement cost-benefit analysis of environmental regulations, and not whether it should be implemented at all. *Id.* at 1655.

This resolution is a net positive for the American public for several reasons. Regulations subject to cost-benefit analyses tend to result in better protection against real harm than do regulations promulgated pursuant to other principles such as feasibility-based assessments. Matthew D. Adler & Eric A. Posner,

*Rethinking Cost-Benefit Analysis*, 109 Yale L.J. 165, 167-69 (1999). Relatedly, cost-benefit analysis of environmental regulations also results in a more effective allocation of limited regulatory funds and a better balance between protection against real harm and the public's need for market efficiency. Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. Pa. L. Rev. 1489, 1489-90 (2002). Finally, commitment to cost-benefit analysis demands transparency from regulatory agencies, making them more accountable to all branches of government and thus to the American citizenry. Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. Chi. L. Rev. 1137, 1138-40 (2001).

This Court perhaps anticipated this result in favor of cost-benefit analysis in its decision in *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981). In that case, this Court held that the Occupational Safety and Health Act did not require the Secretary of Labor to complete a cost-benefit analysis in promulgating regulations, but said nothing to constrain agencies' discretion to do so when Congress is silent on the issue. The court below erred in holding to the contrary, and for that reason—along with the positive policy implications of cost-benefit analysis of environmental regulations—this Court should reverse the Second Circuit's decision.

## ARGUMENT

## I

## COST-BENEFIT ANALYSIS OF ENVIRONMENTAL REGULATIONS BENEFITS THE AMERICAN PUBLIC

### A. Regulations Subject to Cost-Benefit Analysis Better Protect the Public Against Environmental Harms

Regulatory agencies work with finite budgets. For every dollar spent addressing a given harm, one less dollar can be spent on another. Therefore, it only makes sense that when an agency considers a given course of action, it should account for the opportunity costs—relative to foregone regulatory targets—inherent to that decision. This principle has informed the executive orders of every president since Ronald Reagan that have required a comparison of costs and benefits in government action. Sunstein, 99 Mich. L. Rev. at 1655-56. So too has it found favor with the judiciary, with the D.C. Circuit, for example, holding that "it is only where there is 'clear congressional intent to preclude consideration of cost' that we find agencies barred from considering costs." *Michigan v. EPA*, 213 F.3d 663, 678 (D.C. Cir. 2000) (citations omitted).

This principle of rational rule-making was elucidated further by Justice Breyer in his concurrence in *Whitman v. American Trucking Associations*:

> In order better to achieve regulatory goals–for example, to allocate resources so that they save more lives or produce a cleaner environment–regulators must often

> take account of all of a proposed regulation's adverse effects, at least where those effects clearly threaten serious and disproportionate public harm. Hence, I believe that, other things being equal, we should read silences or ambiguities in the language of regulatory statutes as permitting, not forbidding, this type of rational regulation.

531 U.S. 457, 490 (2001) (Breyer, J., concurring in part and concurring in the judgment). Such statutory silence is at issue in the present case, and this Court should follow Justice Breyer's prescription for assessing it.

Justice Breyer is not alone in his citation of the normative benefits of comparing costs and benefits in environmental regulations. In fact, this position is one held even by many who argue that the current regulatory regime doesn't go far enough. *See, e.g.*, Paul Boudreaux, *Environmental Costs, Benefits, and Values: A Review of Daniel A. Farber's Eco-Pragmatism*, 13 Tul. Envtl. L.J. 125, 126, n.62 (1999) (noting Daniel Farber's "pragmatic approach" that includes "the cost-benefit balance of economic analysis" and that "[e]ven environmentalist Christopher Stone has written that environmental law cannot succeed unless it takes account of the economic costs of prevention, and that economic analysis provides a good way of making compromises between costs, benefits, and competing demands").

Professor Cass Sunstein is a preeminent legal scholar on cost-benefit analysis. In establishing his preferred rules that would constitute an ideal set of default principles for cost-benefit regulatory analysis, Sunstein writes:

> Unless Congress has clearly said otherwise, agencies will be permitted to balance the health risks created by regulation against the health benefits created by regulation . . . Unless Congress has clearly said otherwise, agencies will be permitted to take costs into account in issuing regulations . . . Unless Congress has clearly said otherwise, agencies will be expected to balance costs against benefits in issuing regulations.

Sunstein, 99 Mich. L. Rev. at 1668. This general approach is consistent with that of the D.C. Circuit in *Michigan v. EPA*, 213 F.3d at 678, and with Justice Breyer's concurrence in *Whitman*, 531 U.S. at 490.

Sunstein advocates such default rules because he recognizes the tangible benefits of cost-benefit analysis as well as the deficiencies of regulations issued without it. His writing makes frequent reference to the fallibility of human decision making based not on quantitative data but on gut instinct or popular panic, or what he terms "intuitive toxicology." Cass R. Sunstein, *The Arithmetic of Arsenic*, 90 Geo. L.J. 2255, 2257 (2002). Cost-benefit analysis "provides an important improvement over the 'intuitive toxicology' of ordinary people, in which general affect helps to determine judgment. This intuitive toxicology can lead people to large blunders in thinking about risk . . . ." *Id.* This understanding of the way human beings make decisions, and the capacity for cost-benefit analysis to act as a corrective, recommends comparing costs and benefits at least as readily as does a more traditional economics approach. Sunstein, 99 Mich. L. Rev. at 1161-62. As one author puts it somewhat more colloquially, citing Sunstein's work: "Ordinary people,

it seems, have tremendous difficulty calculating probabilities and appreciating risks. Proponents of quantitative decision-making argue that CBA helps overcome these mental glitches . . . ." Clowney, 18 Fordham Envtl. L. Rev. at 115.

Sunstein employs the example of arsenic in drinking water as a prime case of an agency frittering away precious energy and resources attacking a problem that really wasn't one, and thus necessarily not attending to legitimately dangerous environmental risks. Most people, including the heads of regulatory agencies, tend to adhere to

> a set of simple rules for thinking about environmental risks. Among those simple rules is a belief that substances that cause cancer are unsafe and should be banned [without understanding] that low levels of admittedly carcinogenic substances should sometimes be tolerated because the risks are low and the costs of eliminating them are high.

Sunstein, 90 Geo. L.J. at 2262-63. More generally, "literature from law and psychology journals identifies a handful of cognitive failures that repeatedly mar the decision-making process. For one, people tend to evaluate risks based on easily accessible information—like personal experiences and media coverage—rather than on complete scientific data." Clowney, 18 Fordham Envtl. L. Rev. at 115-16 (citing misconceptions about nuclear power and pesticides as examples).

A true comparison of costs and benefits, on the other hand, reduces the chances of codifying such

misconceptions and diverting resources away from legitimate threats. This is not to advocate for a complete technocracy, nor for the elimination of democratic control over regulatory agencies (to the contrary, cost-benefit analysis makes these agencies more democratic, *see* Part I(C) below). Instead, the comparison of costs and benefits is a way to "ensure that when government acts, it does so with some understanding of the likely consequences." Sunstein, 90 Geo. L.J. at 2263.

The affinity of Sunstein, and others, for cost-benefit analysis does not occur in a vacuum. Their work compares the merits of such analyses and other frameworks for regulatory decision making, and finds the alternatives either lacking or incomplete without themselves including a cost-benefit analysis:

> Some suggested alternatives to cost-benefit analysis are nothing of the kind. . . . [C]ost-benefit analysis is not an alternative to technology-based regulation; it is a tool for assessing what kind of regulation makes best sense. Similarly, cost-benefit analysis assists in evaluating pollution trading . . . . In any trading system it is necessary to 'cap' overall emissions, and cost-benefit analysis is a way of helping to decide on the most sensible cap.

Hahn & Sunstein, 150 U. Pa. L. Rev. at n.42.

Real world examples abound where cost-benefit analysis has resulted in more effective, and efficient, environmental regulation. This happens not just where comparing costs and benefits reveals that, as "in many cases, regulations seem to do more harm than

good." *Id.* at 1490 (citing a 2000 study by Hahn finding that over half of regulations examined actually were likely to *increase* the risk of mortality). "Cost-benefit analysis has also led to regulations that accomplish statutory goals at lower cost, or that do not devote limited private and public resources to areas where they are unlikely to do much good." Sunstein, 99 Mich. L. Rev. at 1661. Sunstein identifies asbestos regulations, the control of CFCs, and Great Lakes pollution rules as areas where cost-benefit analysis "helped regulators produce modifications [to regulations] that significantly reduced costs." *Id.*

So too does cost-benefit analysis often assist in persuading decision makers, and the public, that a regulation is necessary where, in the absence of such analysis, a risk would have been overlooked. One author cites the case of leaded gasoline as a prime example. Industry groups strongly opposed gasoline regulations proposed by the EPA in 1984, and largely had succeeded in downplaying the risk posed by lead. Clowney, 18 Fordham Envtl. L. Rev. at 133-34. It was only when the EPA undertook a comprehensive cost-benefit analysis of the proposed regulation and publicized the results, including the finding that "benefits of reducing lead in gasoline would exceed the costs by more than 300 percent," that the public's opinion, and that of the decision makers at the EPA, turned in favor of the proposed regulation. *Id.* at 133. Matthew Adler and Eric Posner, writing in the Yale Law Journal, found similar outcomes regarding the regulation of agricultural pesticides and lead in drinking water. Not until costs and benefits of acting and not acting were quantified did agency decision makers conclude that the regulation of these dangers were rational undertakings; without the insight of cost-

benefit analysis, these dangers possibly would have gone unaddressed. Adler & Posner, 109 Yale L.J. at 172-74.

### B. Cost-Benefit Analysis of Regulations Ensures a Proper Balance Between a Strong Economy and Protecting Natural Resources

The "cost" portion of the cost-benefit pairing refers not just to monetary and opportunity costs incurred by regulatory agencies making a given decision, but also to the private economic costs that will result from a regulation. The burden the regulatory state imposed on the economy was the impetus for President Reagan's signing of the first executive order requiring cost-benefit analyses of government actions, Thomas O. McGarity, *Regulatory Reform in the Reagan Era*, 45 Md. L. Rev. 253 (1986), and similar economic concerns played a part in leading every president since then to "implement the same basic plan." Clowney, 18 Fordham Envtl. L. Rev. at 112. Because "[r]egulations aimed at protecting health, safety, and the environment alone cost over two hundred billion dollars annually–about two-thirds as much as outlays for federal, nondefense discretionary programs," government agencies now are to consider these "real costs to consumers as well as businesses," in their decision making. Robert W. Hahn, et al., *Assessing Regulatory Impact Analyses: The Failure of Agencies to Comply with Executive Order 12,866*, 23 Harv. J.L. & Pub. Pol'y 859, 859 (2000).

Cost-benefit analyses of environmental regulations, in contrast with decision-making frameworks such as the precautionary principle,

> plainly reflect compromises between the environment and other concerns. The commitment to environmental quality does not exist in a vacuum. . . . Indeed, an advocate might argue that this nation has expressed a commitment to private property rights that holds a far older provenance than the environmental commitment. The Constitution's proscription against government "taking" of private property without just compensation arguably is a plain explication of the history and strength of this commitment.

Boudreaux, 13 Tul. Envtl. L.J. at 147-48. This balancing goes back as far as the federal government's nascent entry into the environmental regulatory arena. *Id.* at n.42 (describing President Theodore Roosevelt's support for a dam in Yosemite National Park, over the objections of conservationists including John Muir, based on the need to "respond to human preferences").

"Expensive regulation may well increase prices, reduce wages, and increase unemployment (and hence poverty)." Hahn & Sunstein, 150 U. Pa. L. Rev. at 1493. "Almost all economic analyses (94 percent) note that a regulation will impose compliance costs on producers." Hahn, et al., 23 Harv. J.L. & Pub. Pol'y at 868. Therefore, it makes sense that when an agency aims to issue one of these regulations, it does so with evidence that its economic costs justify its proposed benefits. Unfortunately, the Office of Management and Budget has found that agencies are not always adhering to this principle. According to Hahn and Sunstein, one EPA landfill regulation evidences annual costs of $100 million, with no monetized benefits

whatsoever. 150 U. Pa. L. Rev. at 1491. Other federal environmental measures, ranging from certain chemical regulations to effluent and emissions standards, show similar, or worse, results. *Id.* at 1492. And it is important to note that these counterproductive regulations are being issued *with* the benefit of cost-benefit analysis, albeit analysis overlooked by final decision makers. It can only be presumed that such mistakes might be magnified in frequency and degree were the comparison of costs and benefits not carried out at all. Hahn, et al., 23 Harv. J.L. & Pub. Pol'y at 862 (studying widespread agency failure to conduct proper cost-benefit analyses and suggesting measures to correct the problem). In this case, where the costs of regulatory compliance are estimated by all parties to range far into the billions of dollars, *see, e.g.*, Petition of PSEG Fossil at 32-36, the EPA should be permitted to undertake a bona fide comparison of proposed benefits with these costs.

Cost-benefit analysis surely is made more complex when the proposed benefits are saved human lives, on which placing a monetized price is a facially controversial process. Sunstein, 99 Mich. L. Rev. at 1661. But regulatory analysts have been able to carry out their duties even when faced with the difficult question of quantifying the value of human life. Such comparison of costs and benefits is even more apt, then, where proposed benefits do not involve human lives (or even people's physical well-being) as is the setting of the present case.

### C. Commitment to Cost-Benefit Analysis Makes Regulatory Agencies More Democratically Accountable

A less tangible, but by no means less important, feature of commitment to cost-benefit analysis is that it makes regulatory agencies more accountable to the American people. By increasing transparency in the decision-making process, and reducing the frequency of the kind of "intuitive" actions discussed above, voters can approach regaining some control over the behemoth regulatory apparatus that often impacts their lives more than any other arm of government. *See generally* McGarity, 45 Md. L. Rev. at 253-54.

"[F]ew look at [cost-benefit analysis's] role in an institutional context, that is, as a device whose justification depends on its capacity to help authoritative institutions such as Congress, the presidency, and the courts monitor subordinate institutions such as agencies." Posner, 68 U. Chi. L. Rev. at 1138. As Eric Posner writes, this ignoring of cost-benefit analysis's theoretical justifications likely is a side-effect of such analyses' practical ascendancy and popularity within government circles. *Id.* at 1140.

Posner addresses several arguments for cost-benefit analysis of regulations aside from the strictly consequentialist arguments outlined above. First, and most basically, he writes that agencies in their decision-making processes can make honest technical errors that lead to erroneous final results. *Id.* A public airing of the arithmetic, so to speak, via cost-benefit analysis can serve as a corrective to these understandable though undesirable mistakes.

More importantly, Posner notes that even a scientifically "perfect agency that makes no technical errors may implement projects that diverge from the goals of the President and Congress because the agency, or its chief, or its personnel, have their own divergent goals." *Id.* Such actions are, of course, an all-too-common feature of human nature, and of the regulatory process, and—as manifest in doctrines such as that of non-delegation—are not compatible with government accountable to the will of the governed. By making public not just the final product of the decision-making process, but the factors that lead to these ultimate decisions, the elected branches (and those who elect them) and the judiciary obtain more complete information by which to evaluate an agency's performance and discipline those performing poorly. *Id.* at 1142.

Government officials, though, are not the only parties who get a more transparent view of agency action through cost-benefit analysis. Individual citizens and interest groups affected by regulations also are signaled. "By forcing EPA to state clearly the effects of a regulation, it alerts affected groups, which frequently criticize EPA's estimates." Adler & Posner, 109 Yale L.J. at 175. This is important for two reasons. First, of course, it gives citizens more information on the rules by which they will be governed, and the rationales behind those rules. Aside from the benefits of a more informed populace, this affords affected individuals and groups a chance for input on these rules, if not via the labyrinth of the rulemaking itself then via their elected officials.

Second, it provides citizens with more opportunity to monitor these elected officials themselves, to ensure

that regulatory decisions made under their ultimate direction are aimed to "maximize efficiency" rather than merely to "transfer resources to interest groups." Posner, 68 U. Chi. L. Rev. at 1141. "Proponents of CBA argue that quantitative decision-making offers an antidote to the corruption. . . . Put simply, sunshine is the best disinfectant for the plague of agency quid pro quos." Clowney, 18 Fordham Envtl. L. Rev. at 118.

Thus, a regulatory commitment to cost-benefit analysis serves as a microcosm, of sorts, of the kind of checks and balances that animate our form of government. Elected officials and the judiciary may use the cost-benefit analyses to ensure that regulatory agencies are complying with legislative (and executive) priorities and controlling law, while citizens use this same information to hold both the agencies and their representatives accountable to their will. This theoretical justification for cost-benefit analysis, then, is as important, if not more so, than the normative public policy outcomes realized by comparing costs and benefits within the regulatory realm.

## II

## *AMERICAN TEXTILE V. DONOVAN* DOES NOT PRECLUDE THE EPA'S USE OF COST-BENEFIT ANALYSIS UNDER 33 U.S.C. § 1326(b)

In the opinion below, the Second Circuit addressed the question presented in this case by relying on this Court's decision in *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981). In *American Textile*, this Court addressed the propriety of cost-benefit analysis in a legal and factual setting distinct from that of the present case. Rather than

supporting the Second Circuit's holding, *American Textile* actually supports the validity of the EPA's use of cost-benefit analysis under the relevant provision of the Clean Water Act.

The court below cited *American Textile* for the proposition that

> "Congress itself defined the basic relationship between costs and benefits." *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 509, 101 S.Ct. 2478, 69 L.Ed2d 185 (1981). Moreover, this conclusion is further supported by the fact that Congress in establishing BTA did not expressly permit the agency to consider the relationship of a technology's cost to the level of reduction of adverse environmental impact it produces. "When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute."

*Riverkeeper, Inc. v. EPA*, 475 F.3d 83, 99 (2d Cir. 2007).

The Second Circuit thus interpreted *American Textile* as standing for the proposition that agencies need express authority to engage in cost-benefit analysis. This analysis is wrong, however, because this Court's *American Textile* opinion did not address an agency's *discretion* to engage in cost-benefit analysis, but whether the statute in that case (the Occupational Safety and Health Act) *required* the comparison of costs and benefits. *American Textile*, 452 U.S. at 506. No analogous issue is presented in the present case. The Second Circuit therefore erred in applying an opinion on an agency's *obligation* to

engage in cost-benefit analysis to a case involving the issue of an agency's discretion to do so. *Riverkeeper*, 475 F.3d at 99.

The court below was correct to note that this Court did not endorse cost-benefit analysis in *American Textile*. But, this holding stemmed not from the use of cost-benefit analysis in determining only the "best technology available," as is the situation in the present case, but instead resulted from Congress's instruction to OSHA that best available evidence be assured "to the extent feasible." *American Textile*, 452 U.S. at 508. This feasibility language is not found in the Clean Water Act provision at issue in the present case, and as this Court noted in *American Textile*, "all parties agree that the phrase 'to the extent feasible' contains the critical language." *Id.*

The feasibility language at issue in *American Textile* is important because the Second Circuit relied on that case for the proposition that "[c]ost-benefit analysis . . . is not permitted under [33 U.S.C. § 1326(b)] because . . . Congress has already specified the relationship between costs and benefits in requiring that the technology designated by the EPA to be the best available." *Riverkeeper*, 475 F.3d at 100 (citing *American Textile*, 452 U.S. at 509-10). By including the words "to the extent feasible,"

> Congress itself defined the basic relationship between costs and benefits, by placing the "benefit" of worker health above all considerations save those making attainment of this "benefit" unachievable. Any standard based on a balancing of costs and benefits by the

> Secretary that strikes a different balance than that struck by Congress would be inconsistent with the command set forth in § 6(b)(5). Thus, cost-benefit analysis to OSHA is not required by the statute *because feasibility analysis is.*

*Id.* at 509 (emphasis added).

Thus, the Second Circuit's conclusion that the EPA "could not make the policy decision, in the face of Congress's determination that facilities use the best technology available, that an economically feasible level of reduction of impingement mortality and entrainment is not desirable in light of its cost," *Riverkeeper*, 475 F.3d at 100, is incorrect because feasibility analysis is not required under 33 U.S.C. § 1326(b). As *American Textile* indicates, feasibility analysis is a specific method that may be used in determining when evidence, technology, or any other agency tool is the "best available." 452 U.S. at 509.

The distinction between the analysis of feasibility and the comparison of costs and benefits is one recognized by legal academics as well. *See* Part I *supra*; Adler & Posner, 109 Yale L.J. at 168. Feasibility "requires regulators to set levels based on the capabilities of technology and to figure out the cost of employing the technology to evaluate whether the cost makes widespread plant closures unlikely." David M. Driesen, *Distributing the Costs of Environmental, Health, and Safety Protection: The Feasibility Principle, Cost-Benefit Analysis, and Regulatory Reform*, 32 B.C. Envtl. Aff. L. Rev. 1, 50 (2005). Cost-benefit analysis, on the other hand, "requires assessing the capabilities of technology in order to arrive at cost

estimates and to quantify the amount of reduction associated with that cost, the first step in arriving at a benefits estimate." *Id.* They are two different things, and opinions centered on one should not be imported into cases concerned with the other.

By including the word "feasible," Congress "defined the basic relationship between costs and benefits" under the Occupational Safety and Health Act. *American Textile*, 452 U.S. at 509. *See also* Driesen, 32 B.C. Envtl. Aff. L. Rev. at 10 ("Since principles of statutory interpretation preclude reading statutes to render any of their language superfluous, such as the language requiring 'feasible' measures, courts have understood the feasibility principle as contemplating some technological change that allows production of existing goods and services to continue."). With the absence of this language in 33 U.S.C. § 1326(b), the basic relationship between costs and benefits in determining "best technology available for minimizing adverse environmental impact" at cooling water intake structures is left undefined, and the EPA appropriately used cost-benefit analysis to fill the void. The court below erred in holding to the contrary.

## CONCLUSION

For the reasons stated above, the judgment of the Second Circuit should be reversed.

DATED: July 18, 2008.

Respectfully submitted,

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